UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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ANDRES ORTIZ GARCIA and GUILLERMO RODRIGUEZ MARTINEZ, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

DITMARS SQUARE INC. d/b/a LAST STOP CAFE and MARINOS A. CONSTANTINIDES,

Defendants.
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REPORT AND RECOMMENDATION

16-CV-166 (NGG) (ST)

TISCIONE, United States Magistrate Judge:

Plaintiffs Andres Ordaz Garcia ("Ordaz")[1] and Guillermo Rodriguez Martinez ("Rodriguez") brought this action on January 13, 2016, asserting several claims under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (the "FLSA"), and the New York Labor Law (the "NYLL") against defendants Ditmars Square Inc. d/b/a Last Stop Cafe ("Ditmars Square") and Marinos Constantinides ("Constantinides"). Dkt. No. 1 ("Compl." or the "Complaint"), ¶ 15. Following Defendants' failures to appear, answer, or otherwise respond to the Complaint despite proper service (Dkt. Nos. 6 & 13 (Executed Summons)),[2] Plaintiffs filed requests for certificates of default from the Clerk of the Court on March 28, 2016, as to Ditmars Square (Dkt. No. 8), and on June 21, 2016, as to Constantinides (Dkt. No. 15). The Clerk of the Court entered a default

[1] The docket and complaint in this action refer to Andres "Ortiz" Garcia, but this plaintiff's own declaration and Plaintiffs' memorandum of law in support of the instant motion identify him as Andres "Ordaz" Garcia. I refer to him as "Ordaz" throughout this opinion.

[2] On May 26, 2016, Magistrate Judge Marilyn D. Go vacated a previously entered default against Constantinides and extended *nunc pro tunc* the time to serve Constantinides to April 19, 2016, which is when the executed summons reflects that Constantinides was served. 5/26/2016 Docket Order.

against Ditmars Square on April 13, 2016 (Dkt. No. 10) and against Constantinides on June 22, 2016 (Dkt. No. 16). On July 29, 2016, Plaintiffs moved for default judgment against Defendants, seeking damages for FLSA and NYLL violations, liquidated damages, prejudgment interest, attorney's fees, and costs and disbursements. *See* Dkt. No. 18 (Motion for Default Judgment). On August 23, 2016, District Judge Nicholas G. Garaufis referred the motion to Judge Go for a report and recommendation, and on November 28, 2016, this case was reassigned to me.

Based on a review of the well-pleaded allegations and evidence presented in Plaintiffs' filings, I respectfully recommend that the Court grant the motion for default judgment and enter a total award in the amount of $181,284.55, consisting of: (i) $87,347.09 in damages and prejudgment interest owed to Ordaz; (ii) $88,977.46 in damages and prejudgment interest owed to Rodriguez; (iii) $4260.00 in attorney's fees; and (iv) $700.00 in costs and disbursements.

I. BACKGROUND[3]

Plaintiff Andres Ordaz Garcia worked as a grill worker, a pizza preparer, a cook, and a waiter for a restaurant—defendant Ditmars Square—from approximately 2007 to January 2016. Compl. ¶¶ 19, 40; Dkt. No. 21 (Declaration of Andres Ordaz Garcia) ("Ordaz Decl."), ¶¶ 4, 5. Plaintiff Guillermo Rodriguez Martinez worked ostensibly as a delivery worker, but primarily performed other non-delivery-related tasks including dishwashing, cleaning, plumbing, and grilling work for Ditmars Square from approximately 2004 to January 2016. Compl. ¶¶ 5, 8-12,

[3] On a motion for default judgment, the Court is "required to accept all of [plaintiffs'] factual allegations as true and draw all reasonable inferences in its favor." *Finkel v. Romanowicz*, 577 F.3d 79, 84 (2d Cir. 2009). Thus, the Court "deems all the well-pleaded allegations in the pleadings to be admitted." *Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp.*, 109 F.3d 105, 108 (2d Cir. 1997); *see also Bricklayers & Allied Craftworkers Local 2, Albany, N.Y. Pension Fund v. Moulton Masonry & Constr., LLC*, 779 F.3d 182, 189 (2d Cir. 2015) (affirming liability of defaulting defendant based upon "the factual allegations in the complaint, combined with uncontroverted documentary evidence submitted by plaintiffs").

20, 54-57; Dkt. No. 22 (Declaration of Guillermo Rodriguez Martinez) ("Rodriguez Decl."), ¶¶ 4, 5. Defendant Marinos Constantinides is the owner, manager, principal, or agent of defendant Ditmars Square. Compl. ¶¶ 3, 25, 26.

Plaintiffs' work schedules, compensation, and general work conditions were set by Constantinides, who also maintained the power to hire and fire employees such as Plaintiffs. Compl. ¶¶ 26, 28, 34. Ordaz regularly worked more than 40 hours per week, but was paid at the rate of $10.00 per hour regardless of the number of hours he worked. Ordaz Decl. ¶¶ 8, 13-16. Rodriguez regularly worked more than 40 hours per week, but was paid at the rate of $6.00 per hour regardless of the number of hours he worked. Rodriguez Decl. ¶¶ 8, 13-16. In addition, Rodriguez received tips when he made deliveries, but alleges that Defendants retained ten percent of all tips Rodriguez received via internet orders. *Id.* ¶ 17. Rodriguez was also required to purchase two bicycles and a bicycle helmet as part of his delivery duties for Defendants; these expenses amounted to $430 total, for which Rodriguez was not reimbursed. *Id.* ¶ 23.

Ordaz alleges that he did not receive an overtime premium when he worked more than 40 hours in a week, spread-of-hours pay when he worked more than ten hours in one day, an annual wage notice providing information about wage and employment laws, or a wage statement providing information about Ordaz's rate of pay or hours worked. Ordaz Decl. ¶¶ 15, 16, 18, 20, 21. Rodriguez alleges that he did not receive the minimum wage for all hours he worked, an overtime premium when he worked more than 40 hours in a week, an annual wage notice providing information about wage and employment laws, or a wage statement providing information about Rodriguez's rate of pay or hours worked. Rodriguez Decl. ¶¶ 13-15, 18, 19, 21, 22. Rodriguez also alleges that Defendants unlawfully retained a portion of his tips and failed to reimburse him for expenses relating to equipment for his job. *Id.* ¶¶ 17, 23. However, Rodriguez does not provide any receipts and does not indicate when he incurred the expenses for which he was not reimbursed.

II. DISCUSSION

The Federal Rules of Civil Procedure prescribe a two-step process for a plaintiff to obtain a default judgment. First, "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default." Fed. R. Civ. P. 55(a). Second, after a default has been entered against a defendant, and the defendant fails to appear or move to set aside the default under Rule 55(c), the Court may, on a plaintiff's motion, enter a default judgment. Fed. R. Civ. P. 55(b)(2).

Once a defendant is found to be in default, he is deemed to have admitted all of the well-pleaded allegations in the complaint pertaining to liability. *Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 158 (2d Cir. 1992). However, a court retains the discretion to determine whether a final default judgment is appropriate. *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 95 (2d Cir. 1993); *see also Taylor v. 312 Grand St. LLC*, 2016 WL 1122027, at *3 (E.D.N.Y. Mar. 22, 2016) ("[J]ust because a party is in default, the plaintiff is not entitled to a default judgment as a matter of right.") (internal quotation marks and citations omitted). In light of the Second Circuit's "oft-stated preference for resolving disputes on the merits," default judgments are "generally disfavored." *Enron*, 10 F.3d at 95-96.

Thus, despite a defendant's default, the plaintiff bears the burden of demonstrating that the unchallenged allegations and all reasonable inferences drawn from the evidence provided establish the defendant's liability on each asserted cause of action. *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 137 (2d Cir. 2011); *Au Bon Pain Corp. v. Artect, Inc.*, 653 F.2d

61, 65 (2d Cir. 1981). In other words, "after default . . . it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit conclusions of law." *Rolls-Royce PLC v. Rolls-Royce USA, Inc.*, 688 F. Supp. 2d 150, 153 (E.D.N.Y. 2010) (internal quotation marks and citations omitted), *adopted by*, 688 F. Supp. 2d 150, 151 (E.D.N.Y. 2010).

If liability is established as to a defaulting defendant, then the Court must conduct an analysis to establish damages to a "reasonable certainty." *Credit Lyonnais Sec. (USA), Inc. v. Alcantara*, 183 F.3d 151, 155 (2d Cir. 1999). When a defendant defaults in an FLSA action, the plaintiff's recollection and estimates of hours worked are presumed to be correct. *Lopez v. Yossi's Heimishe Bakery Inc.*, 2015 WL 1469619, at *3 (E.D.N.Y. Mar. 9, 2015) (citation omitted), *adopted by*, 2015 WL 1469619 (E.D.N.Y. Mar. 30, 2015).

A. Qualification for Protection Under the FLSA

The FLSA governs minimum wages, maximum hours, and other policies and practices affecting employees and employers. *See Sandifer v. U.S. Steel Corp.*, 134 S.Ct. 870, 875 (2014). Under the FLSA, an "employer" is broadly defined to include "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). An employee is defined as "any individual employed by an employer." *Id.* § 203(e)(1). To be protected by the FLSA's wage and overtime provisions, an employee must demonstrate either that he was "engaged in commerce or in the production of goods for commerce" or that his employer was an "enterprise engaged in commerce or in the production of goods for commerce." *Id.* §§ 203(s)(1), 207(a)(1); *see Lopez*, 2015 WL 1469619, at *3. The latter enterprise coverage "applies when an enterprise (1) 'has employees engaged in commerce or in the production of goods for commerce,' or 'has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person,' and (2) has annual gross volume of sales made or business done of not less than $500,000." *Galicia v. 63-68 Diner Corp.*, 2015 WL 1469279, at *2 (E.D.N.Y. Mar. 30, 2015) (quoting 29 U.S.C. § 203(s)(1)(A)). An individual defendant may be subject to FLSA liability if he exercises "operational control" over the plaintiff-employee. *Id.*

Defendants each meet the definition of an employer under the FLSA: the allegations in the Complaint, combined with documentary evidence submitted in support of the instant motion, suffice to establish that Defendants operate a restaurant in Queens; that Ditmars Square was managed and controlled by Constantinides; that Ditmars Square has annual revenues in excess of $500,000; and that Defendants engaged in interstate commerce in the purchase of goods or materials to support the restaurant's function. *See* Compl. ¶¶ 21-36; Ordaz Decl. ¶¶ 2, 3 7; Rodriguez Decl. ¶¶ 2, 3, 7; *see Fermin v. Las Delicias Peruanas Rest., Inc.*, 93 F. Supp. 3d 19, 33 (E.D.N.Y. 2015) ("As a restaurant [with over $500,000 in annual sales], it is reasonable to infer that Las Delicias requires a wide variety of materials to operate, for example, foodstuffs, kitchen utensils, cooking vessels, cleaning supplies, paper products, furniture, and more. It is also reasonable to infer that some of these materials moved or were produced in interstate commerce."), *adopted by*, 93 F. Supp. 3d 19, 23 (E.D.N.Y. 2015); *see also Mahoney v. Amekk Corp.*, 2016 WL 6585810, at *6-9 (E.D.N.Y. Sept. 30, 2016) (recommending conclusions that plaintiff is employee and defendants are employers based on similar allegations in complaint), *adopted by*, 2016 WL 6601445 (E.D.N.Y. Nov. 7, 2016).

Furthermore, Plaintiffs adequately establish that Defendants were their employers, acted jointly with respect to the pertinent wage practices, failed to pay Plaintiffs the wages required by state and federal law, and failed to provide Plaintiffs with required notices and wage statements.

See generally Compl. ¶¶ 19-96; *see also Lopez*, 2015 WL 1469619, at *7 (recommending finding that plaintiffs were employees and defendants were employers based on similar analysis).[4]

B. Qualification for Protection Under the NYLL

As with the FLSA, the NYLL covers certain activities or practices affecting employers and employees. The NYLL defines an employer as a "person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service." NYLL § 190(3). An employee is defined as "any person employed for hire by an employer in any employment." *Id.* § 190(2).

"[U]nder the NYLL, 'the critical inquiry in determining whether an employment relationship exists pertains to the degree of control exercised by the purported employer over the results produced or the means used to achieve the results.'" *Meyer v. U.S. Tennis Ass'n*, 607 F. App'x 121, 122 (2d Cir. 2015) (summary order) (quoting *Bynog v. Cipriani Grp., Inc.*, 1 N.Y.3d 193, 198, 770 N.Y.S.2d 692, 694-95 (2003)). The relevant factors in this analysis include whether the worker: "(1) worked at his own convenience; (2) was free to engage in other employment; (3) received fringe benefits; (4) was on the employer's payroll; and (5) was on a fixed schedule." *Bynog*, 1 N.Y.3d at 198, 770 N.Y.S.2d at 695 (citations omitted).

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[4] With regard to whether Constantinides was Plaintiffs' employer for FLSA purposes, the Second Circuit has identified the factors to consider as "whether the alleged [individual] employer: (1) had the power to hire and fire employees; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records." *Irizarry v. Catsimatidis*, 722 F.3d 99, 103-05 (2d Cir. 2013) (citing *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984)). Plaintiffs' specific allegations regarding Constantinides, especially his control over Plaintiffs' work assignments and schedule, suffice to establish that Constantinides was Plaintiffs' employer under the FLSA. *See* Compl. ¶ 26 ("[Constantinides] determined the wages and compensation of the employees of Defendants, including Plaintiffs, and established the schedules of the employees, maintained employee records, and had the authority to hire and fire employees."); *id.* ¶¶ 28-30.

The *Bynog* factors favor a finding of an employment relationship here. As discussed above, Defendants, in particular Constantinides, exerted complete control over Plaintiffs' work assignments and schedule. *See* Compl. ¶¶ 26, 28-34. Plaintiffs had set schedules, and worked when they were told. Compl. ¶¶ 39, 43-47, 54, 60-64; Ordaz Decl. ¶¶ 4, 8-15; Rodriguez Decl. ¶¶ 4, 8-15. Thus, the first factor is met because Defendants, specifically Constantinides, set Plaintiffs' schedule. There is no evidence as to whether Plaintiffs were free to engage in other employment, so the second factor is neutral. *See Mahoney*, 2016 WL 6585810, at *7. Third, both Ordaz and Rodriguez were exclusively paid in cash. Ordaz Decl. ¶ 17; Rodriguez Decl. ¶ 18. Therefore, this factor "arguably favor[s] Defendants insofar as Plaintiff[s] [were] paid 'off the books' specifically to avoid the expense of providing benefits," though this factor merits only "'modest weight.'" *Mahoney*, 2016 WL 6585810, at *7 (citation omitted). Next, Rodriguez was allegedly on Defendants' payroll (Compl. ¶¶ 8, 11), so the fourth factor slightly favors Plaintiffs. *Fermin*, 93 F. Supp. 3d at 34. Finally, the fifth factor favors Plaintiffs because, as discussed, they worked "on the same days every week, for the same number of hours and shifts." *Mahoney*, 2016 WL 6585810, at *8. Considering the *Bynog* factors "under the circumstances, and in view of the overarching degree of control exercised by Defendants," I find that Plaintiffs qualify as employees under the NYLL and Defendants qualify as Plaintiffs' employers. *Id.* at *8.[5]

"As the Court has found that [Ditmars Square] and [Constantinides] were jointly Plaintiffs' employers, each Defendant is jointly and severally liable under the FLSA and the

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5 In light of my conclusion that Constantinides was Plaintiffs' employer under the FLSA, I also recommend that the Court find that Constantinides was Plaintiffs' employer for purposes of NYLL liability as well. *See Mahoney*, 2016 WL 6585810, at *9 (citing cases and concluding that the standards for employers are coextensive under the FLSA and the NYLL).

NYLL for any damages award made in Plaintiffs' favor." *Fermin*, 93 F. Supp. 3d at 37; *accord* *Mahoney*, 2016 WL 6585810, at *9.

C. Liability

I read the Complaint to raise several claims under the FLSA and New York state law: (i) failure to pay Rodriguez the minimum wage in violation of 29 U.S.C. § 206(a) and NYLL § 652(1); (ii) failure to pay Ordaz and Rodriguez an overtime premium when they worked more than 40 hours in a week in violation of 29 U.S.C. § 207 and 12 N.Y.C.R.R. § 146-1.4; (iii) failure to pay Ordaz a spread-of-hours premium in violation of 12 N.Y.C.R.R. § 146-1.6; (iv) misappropriation of tips that were earned by Rodriguez in violation of NYLL § 196-d; (v) failure to reimburse Rodriguez for "tools of the trade" that he purchased in violation of 29 U.S.C. § 206(a) and NYLL § 193; and (vi) failure to comply with the written notice and wage statement requirements of NYLL § 195. I will discuss each of these claims in turn.

1. Statute of Limitations

Before a discussion of Plaintiffs' specific claims in this case, the Court will briefly mention the timing parameters within which these claims will be analyzed. "The statute of limitations under the FLSA is two years, 'except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.'" *Rosario v. Valentine Ave. Discount Store, Co.*, 828 F. Supp. 2d 508, 519 (E.D.N.Y. 2011) (quoting 29 U.S.C. § 255(a)). Here, Plaintiffs allege that Defendants' conduct was knowing and willful, so the three-year limitations period applies to Plaintiffs' FLSA claims. Compl. ¶¶ 83, 93, 99; *see* *Fermin*, 93 F. Supp. 3d at 38. In contrast, the NYLL establishes a six-year limitations period. *Fermin*, 93 F. Supp. 3d at 38 (citing NYLL §§ 198(3), 663(3)). Thus, Plaintiffs may recover under the NYLL for claims arising outside of the FLSA's three-year limitations period.

As the Complaint was filed on January 13, 2016, the federal law limitations period includes claims from January 13, 2013 to January 13, 2016, and the state law limitations period includes claims from January 13, 2010 to January 13, 2016.

2. Minimum Wage Violations

At all times relevant to this litigation, the federal minimum wage was $7.25 per hour. *See* 29 U.S.C. § 206(a)(1)(C). The New York minimum wage was $7.15 per hour from January 1, 2007 to December 30, 2013; $8.00 per hour from December 31, 2013 to December 30, 2014; $8.75 per hour from December 31, 2014 to December 30, 2015; and $9.00 per hour on and after December 31, 2015. NYLL § 652(1).

"An employee bringing an action for unpaid minimum wages under the FLSA and the NYLL 'has the burden of proving that he performed work for which he was not properly compensated.'" *Fermin*, 93 F. Supp. 3d at 41 (citations omitted). Here, Plaintiffs sufficiently establish that Rodriguez performed such work. The uncontroverted allegations and evidence indicate that Rodriguez was paid $6.00 per hour in cash throughout his employment by Defendants. Compl. ¶ 64; Rodriguez Decl. ¶¶ 12, 13. Plaintiffs support this claim with information about Rodriguez's employment schedule, including Rodriguez's declaration in which he testifies about his own schedule and pay. Compl. ¶¶ 54, 60-64; Rodriguez Decl. ¶¶ 8-13. "[I]nsofar as [Rodriguez was] paid in cash and therefore do[es] not have the benefit of paper records to consult, there is nothing suspicious about the fact that [he] cannot recall the dates with precision," and the Court may rely on Rodriguez's testimony in the absence of the records that employers are required to keep in accordance with federal and New York law. *Fermin*, 93 F. Supp. 3d at 41.

In short, by defaulting, Defendants have not contradicted Plaintiffs' reasonably specific allegations and the credible declaration of Rodriguez that sufficiently establish Rodriguez's work schedule and the pay that Defendants gave to Rodriguez as compensation. *See id.* Accordingly, I respectfully recommend that the Court find Defendants liable for failing to pay Rodriguez the minimum wage under the FLSA and the NYLL.

3. Overtime Violations

Plaintiffs allege that both Ordaz and Rodriguez were not provided with overtime compensation as required by the FLSA and the NYLL. Employees who work more than 40 hours in a single workweek are entitled to an overtime wage of not less than one-and-one-half times the regular rate for the excess hours. 29 U.S.C. § 207(a)(1); 29 C.F.R. § 778.110(a); 12 N.Y.C.R.R. § 146-1.4; *see Nakahata v. New York-Presbyterian Healthcare Sys., Inc.*, 723 F.3d 192, 200 (2d Cir. 2013) ("[T]he NYLL adopts . . . the FLSA definition of overtime into the NYLL.") (internal quotation marks and citation omitted).

Case law in this Circuit has clarified the pleading standard for establishing liability for failure to pay FLSA and NYLL overtime premiums. *See Fermin*, 93 F. Supp. 3d at 44 (recommending finding of overtime liability where plaintiffs provided "concrete allegations regarding the overtime that they worked"); *accord Leon v. Port Washington Union Free Sch. Dist.*, 49 F. Supp. 3d 353, 357-58 (E.D.N.Y. 2014); *cf. Dejesus v. HF Mgmt. Servs., LLC*, 726 F.3d 85, 88-90 (2d Cir. 2013) (discussing cases and concluding that "bare-bones complaint" did not adequately establish FLSA overtime liability).

Here, Plaintiffs have established Defendants' liability for overtime violations under the FLSA and the NYLL. Plaintiffs have provided the Court with concrete allegations regarding their overtime worked, for which they received no premium. The Complaint and Ordaz's declaration state that Ordaz worked more than 40 hours per week from January 2010 to approximately January 8, 2016 on set schedules and without exception. Compl. ¶¶ 39, 43-47; Ordaz Decl. ¶¶ 4, 8-15 (describing how Ordaz worked approximately 60 hours per week from January 2010 to January 2011, approximately 60 hours per week from January 2011 to August 2014, and approximately 57 hours per week from August 2014 to January 2016). Similarly, the Complaint and Rodriguez's declaration state that Rodriguez worked more than 40 hours per week from January 2010 to approximately January 8, 2016 on set schedules and without exception. Compl. ¶¶ 54, 60-64; Rodriguez Decl. ¶¶ 4, 8-15 (describing how Rodriguez worked approximately 54 hours per week from January 2010 to January 2011, approximately 48 hours per week from January 2011 to August 2014, and approximately 49 hours per week from August 2014 to January 2016). However, despite working more than 40 hours per week, Ordaz was paid at a rate of $10.00 for every hour he worked (Ordaz Decl. ¶ 13) and Rodriguez was paid at a rate of $6.00 for every hour that he worked (Rodriguez Decl. ¶13).

Accordingly, I respectfully recommend that the Court find Defendants liable for failing to pay Plaintiffs the overtime compensation to which they were entitled under the FLSA and the NYLL.

4. Spread-of-Hours Payments

Plaintiffs further allege that Defendants unlawfully failed to make spread-of-hours payments to Ordaz as required by the NYLL, as there is no cause of action for spread-of-hours payments under the FLSA. *Fermin*, 93 F. Supp. 3d at 45. Effective January 1, 2011, the state regulation applicable to these claims by employees of restaurants provides, "The spread of hours is the length of the interval between the beginning and end of an employee's workday. . . . On each day on which the spread of hours exceeds 10, an employee shall receive one additional hour of pay at the basic minimum hourly rate. . . . This section shall apply to all employees in restaurants and all-year hotels, regardless of a given employee's regular rate of pay." 12 N.Y.C.R.R. § 146-1.6.

Here, Plaintiffs have established Defendants' liability for spread-of-hours payments to Ordaz beginning in 2011. Plaintiffs have provided the Court with concrete allegations and testimony that Ordaz worked more than ten hours per day throughout his employment by Defendants: the Complaint and Ordaz's declaration state that Ordaz worked, in accordance with his set schedule, at least ten hours in a single workday three times per week from January 2011 to January 2016. Compl. ¶¶ 45, 46; Ordaz Decl. ¶¶ 10, 11. Ordaz never received spread-of-hours payments. Ordaz Decl. ¶ 16. Accordingly, I respectfully recommend that Defendants be found liable for spread-of-hours payments owed to Ordaz from January 2011 to January 2016.

However, the same cannot be said of the period of Ordaz's employment from January 2010 through December 2010. Prior to the implementation of 12 N.Y.C.R.R. § 146-1.6, the relevant regulation did not extend spread-of-hours payments to employees who were paid more than the minimum wage. 12 N.Y.C.R.R. § 142-2.4 ("An employee shall receive one hour's pay at the basic minimum hourly wage rate, in addition to the minimum wage required in this Part for any day in which . . . the spread of hours exceeds 10 hours"); *see Andrade v. 168 First Ave. Rest. Ltd.*, 2016 WL 3141567, at *5 (S.D.N.Y. June 3, 2016) (describing changes effective as of January 2011), *adopted by*, 2016 WL 3948101 (S.D.N.Y. July 19, 2016).

Ordaz earned $10 per hour throughout his employment, which is greater than the $7.25 per hour minimum wage applicable before 2011. Accordingly, I respectfully recommend that Defendants not be held liable for spread-of-hours pay violations occurring before January 1, 2011. *See Xochimitl v. Pita Grill of Hell's Kitchen, Inc.*, 2016 WL 4704917, at *7-9 (S.D.N.Y.

Sept. 8, 2016) (recommending that the court decline to award spread-of-hours pay to restaurant employee who earned more than minimum wage before January 2011 but award spread-of-hours pay beginning in 2011), *adopted by*, 2016 WL 6879258 (S.D.N.Y. Nov. 21, 2016); *accord Quiroz v. Luigi's Dolceria, Inc.*, 2016 WL 2869780, at *5 (E.D.N.Y. May 17, 2016).

5. Misappropriation of Tips

Plaintiffs further allege that Defendants misappropriated Rodriguez's tips. Both the FLSA and the NYLL permit employers to credit a portion of an employee's tips against the minimum wage in certain situations. *See* 29 U.S.C. § 203(m); 12 N.Y.C.R.R. § 146-1.3. In order to avail itself of a tip credit, an employer must inform the employee of its intent to utilize a tip credit and must permit an employee to retain all tips received. *See* 29 U.S.C. § 203(m) (employee must be "informed by the employer of the provisions of this subsection"); 12 N.Y.C.R.R. § 146-2.2(a) (requiring written notice of "the amount of tip credit, if any, to be taken from the basic minimum hourly rate"); *see generally Mahoney*, 2016 WL 6585810, at *12-13.

Here, Defendants failed to satisfy either of the tip-credit requirements. Rodriguez was not provided with written notice and was not otherwise informed of Defendants' intent to take a tip credit, and Defendants withheld tips that Rodriguez received from customers to whom he delivered food. Compl. ¶¶ 12, 66-68; Rodriguez Decl. ¶¶ 13, 17. Thus, Defendants were not eligible to take a tip credit against Rodriguez's wages.

Furthermore, Plaintiffs have sufficiently established that Defendants violated the NYLL by allegedly retaining tips that Rodriguez earned. Compl. ¶¶ 12, 68; Rodriguez Decl. ¶ 17. The NYLL provides that an employer may not "accept . . . any part of the gratuities, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee." NYLL § 196-d. Accordingly, Defendants are liable for misappropriating Rodriguez's tips and Rodriguez is entitled to reimbursement of the tips he was not provided. *See Mahoney*, 2016 WL 6585810, at *13; *Gunawan v. Sake Sushi Rest.*, 897 F. Supp. 2d 76, 90 (E.D.N.Y. 2012) (awarding employee the 10% of tips unlawfully retained by employer).

6. Tools of the Trade

Plaintiffs also allege that Rodriguez was not reimbursed for "tools of the trade" that he purchased—namely two bicycles and a helmet—in violation of the FLSA and the NYLL. If an employee provides "tools of the trade which will be used in or are specifically required for the performance of the employer's particular work," then it would be a violation of the FLSA if "the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid him." 29 C.F.R. § 531.35. Similarly, Section 193 of the NYLL "broadly prohibits employers from taking money from their employees for the employer's own benefit." *Hart v. Rick's Cabaret Int'l Inc.*, 967 F. Supp. 2d 901, 951 (S.D.N.Y. 2013) (citation omitted). Specifically, the NYLL prohibits employers from requiring "an employee to make any payment by separate transaction unless such charge or payment is permitted as a deduction from wages" under Section 193(1). NYLL § 193(3)(a). A "separate transaction" has been interpreted to include a payment that "come[s] from an employee's own funds." *Hart*, 967 F. Supp. 2d at 954.

In this case, Plaintiffs' allegations and evidence that Rodriguez purchased two bicycles and a bicycle helmet during his employment by Defendants, at his own cost and for the performance of his work as a delivery worker, suggest a violation of the FLSA and the NYLL. Compl. ¶ 73; Rodriguez Decl. ¶ 23; *see Cao v. Wu Liang Ye Lexington Rest. Inc.*, 2010 WL 4159391, at *4 (S.D.N.Y. Sept. 30, 2010) (holding that bicycles were tools of the trade where delivery workers "were required to purchase bicycles, which were used and specifically required for their delivery work"). However, I cannot recommend that the Court find Defendants liable.

As discussed above, there is a three-year limitations period for FLSA violations and a six-year limitations period for NYLL violations. Plaintiffs here have not provided any evidence or allegations as to when Rodriguez purchased the bicycles or helmet so that the Court could make a "just and reasonable inference" that the expenses were incurred within the limitations period. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). In contrast, the evidence that Rodriguez has been employed as a delivery worker "throughout" his employment—beginning in 2004—suggests that at least some of the expenses were incurred outside of the limitations period. *See* Compl. ¶¶ 54-57; Rodriguez Decl. ¶¶ 4, 5. While the absence of documentation or receipts does not preclude the Court from being reasonably certain about the extent of the alleged failure to reimburse (*Credit Lyonnais*, 183 F.3d at 155), the fact that neither the declaration of Rodriguez nor the Complaint specifies when these expenses were incurred makes it impossible to determine how much, if any, of the alleged expenditures fall within the applicable limitations period. Therefore, I respectfully recommend that the Court decline to impose liability against Defendants for failing to reimburse expenses incurred by Rodriguez in purchasing tools of the trade.

7. Written Notice and Wage Statement Violations

Plaintiffs also argue that Defendants are liable for failure to provide the annual written notice described in NYLL § 195(1) and wage statements in accordance with NYLL § 195(3). Between April 9, 2011 and December 29, 2014, NYLL § 195(1) required an employer to provide its employees "on or before February first of each subsequent year of the employee's employment with the employer a notice" containing information about rates of pay, any allowances or credits taken by the employer, and other information. *Zheng v. Nanatori Japanese Rest. Corp.*, 2017 WL 758489, at *5 & n.5 (E.D.N.Y. Jan. 9, 2017), *adopted by*, 15-cv-1222

(RJD) (RML), Dkt. No. 31 (E.D.N.Y. Jan. 31, 2017); *Guaman v. Krill Contracting, Inc.*, 2015 WL 3620364, at *4 (E.D.N.Y. May 20, 2015), *adopted by*, 2015 WL 3620364 (E.D.N.Y. June 9, 2015).[6] Section 195(3) requires an employer to furnish an employee with a wage statement containing numerous pieces of information about an employee's rate and basis of pay (including "the number of regular hours worked[ ] and the number of overtime hours worked"), any allowances and deductions, and information about the employer each time that the employee is paid. NYLL § 195(3); *see Perez v. Merrick Deli & Grocery, Inc.*, 2015 WL 4104790, at *3 (E.D.N.Y. July 8, 2015).

It is well-settled that a failure to furnish a written notice or a wage statement is a violation of the NYLL. *E.g.*, *Zheng*, 2017 WL 758489, at *5 (written notice); *Perez*, 2015 WL 4104790, at *3 (wage statement). Plaintiffs sufficiently allege that neither the written notice nor the weekly wage statements were provided to them by Defendants. Compl. ¶¶ 51-53, 70-72; Ordaz Decl. ¶¶ 18, 20, 21; Rodriguez Decl. ¶¶ 19, 21, 22. Accordingly, I respectfully recommend that the Court find Defendants liable for violating NYLL §§ 195(1) and 195(3).

B. Damages

By defaulting, a defendant admits to all of the well-pleaded allegations concerning liability, but not those pertaining to damages. *Greyhound Exhibitgroup*, 973 F.2d at 158. As stated above, once liability is established as to a defaulting defendant, the plaintiff must still establish damages to a "reasonable certainty." *Credit Lyonnais*, 183 F.3d at 155.[7] Here, Plaintiffs

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6 I recognize that this section of the NYLL (also known as the Wage Theft Protection Act) has been amended on several occasions, including an amendment that was effective as of December 29, 2014 requiring such notice be provided only at the time of hiring. However, I follow the analysis of Judge Levy in *Zheng* and Judge Reyes in *Guaman* and apply the notice provision that was in place during Plaintiffs' employment in this case.

7 Under Rule 55, the Court "may conduct hearings or make referrals . . . when, to enter or effectuate judgment, it needs to . . . determine the amount of damages [or] establish the truth of

seek a judgment in the combined amount of $209,196.89 in damages, plus $6300.00 in attorney's fees, costs, and disbursements. *See* Dkt. No. 20-7 (Computation of Damages); Dkt. No. 19 (Memorandum in Support), at 11.

1. Liquidated Damages

Plaintiffs request that they be awarded liquidated damages under both the FLSA and the NYLL for periods of underpayment. *See* Dkt. No. 19 (Memorandum in Support), at 8-10. Under the FLSA, a district court is generally required to award liquidated damages in the amount of actual damages for unpaid minimum wage and overtime compensation (*see* 29 U.S.C. § 216(b)), unless the employer can show that it acted in "good faith" and "had reasonable grounds for believing" that it was compliant with the FLSA (*id.* § 260). *Barfield v. New York City Health & Hosps. Corp.*, 537 F.3d 132, 150 (2d Cir. 2008). The NYLL also provides for liquidated damages in the amount of actual damages[8] unless an employer "proves a good faith basis for believing that its underpayment of wages was in compliance with the law." NYLL § 198(1-a).

District courts in this Circuit have disagreed about whether a plaintiff may "stack" liquidated damages under both statutes. *Compare, e.g.*, *Galicia*, 2015 WL 1469279, at *7 ("Because the FLSA's liquidated damages provision serves a compensatory purpose while the NYLL's serves a punitive purpose, a plaintiff may be awarded both simultaneously for the same period of underpayment.") (citations omitted), *with, e.g.*, *Mahoney*, 2016 WL 6585810, at *15

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any allegation by evidence." Fed. R. Civ. P. 55(b)(2). However, a hearing is not required, as detailed affidavits and other documentary evidence can suffice. *Sun v. AAA Venture Capital, Inc.*, 2016 WL 5793198, at *3 (E.D.N.Y. Sept. 12, 2016) (citing *Action S.A. v. Marc Rich & Co.*, 951 F.2d 504, 508 (2d Cir. 1991)), *adopted as modified by*, 2016 WL 5868579 (E.D.N.Y. Oct. 6, 2016). Here, the Complaint, the declarations of Ordaz and Rodriguez, and other filings are sufficiently detailed and a hearing is not necessary.

[8] The FLSA limits damages to minimum wage and overtime compensation (*see* 29 U.S.C. § 216(b)), while the NYLL permits broader recovery of the "total amount of wages found to be due" under Article 6 of the NYLL (*see* NYLL § 198(1-a)).

(recommending award of liquidated damages only under one statute because "[a] conclusion otherwise effectively sanctions a judge-created treble damages remedy that neither legislature—Congress nor New York—appears to have intended.") (internal quotation marks and citations omitted). I agree with the latter view and recognize the emerging trend denying a cumulative recovery of liquidated damages in light of recent amendments to the NYLL to mirror the FLSA liquidated damages provision. *E.g.*, *Guardado v. 13 Wall St., Inc.*, 2016 WL 7480358, at *12 (E.D.N.Y. Dec. 2, 2016), *adopted by*, 2016 WL 7480363 (E.D.N.Y. Dec. 29, 2016); *Espinoza v. Indus. Glass & Mirror Inc.*, 2016 WL 7650592, at *6 (E.D.N.Y. Nov. 30, 2016), *adopted by*, 2017 WL 65828 (E.D.N.Y. Jan. 5, 2017); *Khan v. Party Pizza Inc.*, 2016 WL 4597479, at *4-5 (E.D.N.Y. Aug. 16, 2016), *adopted by*, 2016 WL 4596001 (E.D.N.Y. Sept. 2, 2016).

This view was recently endorsed by the Second Circuit in *Chowdhury v. Hamza Express Food Corp.*, -- F. App'x --, 2016 WL 7131854, at *2 (2d Cir. Dec. 7, 2016) (summary order), in which the panel issued a summary order affirming the District Court's ruling that liquidated damages should not be awarded under both the FLSA and the NYLL in a default judgment. The *Chowdhury* panel reasoned that the 2010 amendments to the NYLL show an intention "to conform [the state law provision] as closely as possible to the FLSA's liquidated damages provision." *Id.* Thus, "whatever reasons existed to award liquidated damages under the relevant provisions of both the FLSA and the NYLL before 2010, . . . the subsequent amendments to the NYLL . . . hav[e] eliminated those reasons." *Id.* Although not technically binding precedent, this Court declines "to flout germane guidance of a Circuit Court panel and to substitute its own conclusion of law." *United States v. Tejeda*, 824 F. Supp. 2d 473, 475 (S.D.N.Y. 2010); *see also Koehler v. Metro. Transp. Auth.*, 2016 WL 6068810, at *3 (E.D.N.Y. Oct. 14, 2016) ("Although

. . . an unpublished summary order . . . is not binding on this Court, that does not mean that the Court is free to disregard its guidance.") (citations omitted).

Where "stacked" liquidated damages are not permitted, plaintiffs should "recover under the statute that provides the greatest relief." *Castillo v. RV Transport, Inc.*, 2016 WL 1417848, at *3 (S.D.N.Y. Apr. 11, 2016). Accordingly, I respectfully recommend applying liquidated damages under the NYLL—rather than the FLSA—so that Plaintiffs may recover the larger amount of liquidated damages. *See id.*; *Li v. Leung*, 2016 WL 5369489, at *19 (E.D.N.Y. June 10, 2016), *adopted as modified by*, 2016 WL 5349770 (E.D.N.Y. Sept. 23, 2016).[9] Section 198(1-a) of the NYLL prescribes the calculation of liquidated damages pursuant to that statute: an amendment to the liquidated damages provision has been effective since April 9, 2011 but is not retroactive, so "any liquidated damages that a plaintiff may be entitled to after this date is calculated at 100% of the amount owed and any recovery before that date shall be calculated at the original 25% owed." *Fermin*, 93 F. Supp. 3d at 47 (citations omitted). I will apply this rule to the claims of Ordaz and Rodriguez separately below.

2. Prejudgment Interest

Plaintiffs seek prejudgment interest calculated at a rate of 9% per annum on their New York state law claims pursuant to CPLR 5004. Dkt. No. 19 (Memorandum in Support), at 10-11. It is well-settled that prejudgment interest is not available under the FLSA. *Fermin*, 93 F. Supp. 3d at 48. However, the Second Circuit has held that liquidated damages and prejudgment interest do not serve the same purpose under the NYLL, so prevailing plaintiffs may recover both on NYLL claims. *Reilly v. Natwest Mkts. Grp. Inc.*, 181 F.3d 253, 265 (2d Cir. 1999).

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[9] Of course, as a result of their default, Defendants have not "prove[n] a good faith basis to believe that [their] underpayment of wages was in compliance with the law" so as to avoid the imposition of liquidated damages under the NYLL. *See* NYLL § 198(1-a).

New York law provides that, when "damages were incurred at various times," prejudgment interest "shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date." CPLR 5001(b); *accord Saucedo v. On the Spot Audio Corp.*, 2016 WL 8376837, at *16 (E.D.N.Y. Dec. 21, 2016) (using reasonable intermediate date when NYLL damages occurred over time), *adopted by*, 2017 WL 780799 (E.D.N.Y. Feb. 28, 2017). Courts have wide discretion to determine a reasonable date from which to award prejudgment interest. *Conway v. Icahn & Co.*, 16 F.3d 504, 512 (2d Cir. 1994). Applying the reasonable intermediate date approach, I will select a date for each plaintiff representing the midpoint of his claims: for both Ordaz and Rodriguez, the midpoint date for the purposes of my prejudgment interest calculation will be January 11, 2013 (the midpoint between January 13, 2010 and January 8, 2016).

3. Written Notice and Wage Statements

Plaintiffs each seek $10,000.00 in damages for written notice and wage statement violations. Ordaz began working for Defendants in 2007 while Rodriguez began working for Defendants in 2004, and both stopped working for Defendants on or about January 8, 2016. Ordaz Decl. ¶ 4; Rodriguez Decl. ¶ 4. Due to the evolution of NYLL §§ 195 and 198 over time, Plaintiffs are only entitled to $5000.00 each for wage statement violations.

Ordaz and Rodriguez are entitled to damages for Defendants' failure to provide the wage statements required by NYLL § 195(3). As discussed above, Ordaz and Rodriguez have sufficiently alleged that they never received the required written notice or wage statement. The version of Section 198(1-d) that was effective between February 27, 2015 and January 18, 2016 provides that an employee who does not receive a wage statement required by NYLL § 195(3) shall recover $250 per work day that the violation occurred or continued to occur, up to

$5000.00. *See* NYLL § 198(1-d) (effective Feb. 27, 2015 to Jan. 18, 2016). Ordaz and Rodriguez are each therefore entitled to $5000.00 in damages for wage statement violations.[10] *See Morales v. MW Bronx, Inc.*, 2016 WL 4084159, at *10 & App'x C (S.D.N.Y. Aug. 1, 2016).

However, there are no damages available for Defendants' failure to provide the written notice required by NYLL § 195(1). The version of NYLL § 198 that was effective from November 24, 2009 to April 8, 2011 does not provide for damages for a written notice violation, while the versions of NYLL § 198 that were effective from April 9, 2011 to February 26, 2015, and from February 27, 2015 to January 18, 2016 only permit an employee to obtain damages for written notices that were not provided to the employee within ten days of the start of his employment, rather than for written notices that were not provided every February. NYLL § 198(1-b) (effective Feb. 27, 2015 to Jan. 18, 2016); NYLL § 198(1-b) (effective Apr. 9, 2011 to Feb. 26, 2015); NYLL § 198(1-b) (effective Nov. 24, 2009 to Apr. 8, 2011). The portion of NYLL § 195 that required the written notice at the time of an employee's hiring was not effective until October 26, 2009, well after both Ordaz and Rodriguez were hired, so no damages may be awarded for failure to provide the required written notice at hiring. 2009 Session Law News of New York, Ch. 270 S. 3357 (McKinney's) (effective Oct. 26, 2009); *see Guaman*, 2015 WL 3620364, at *8-9. Accordingly, I respectfully recommend that neither Ordaz nor Rodriguez be awarded damages for Defendants' failure to provide the required written notice under NYLL § 195(1).

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10 Damages for wage statement violations are not subject to liquidated damages under the NYLL. *Guaman*, 2015 WL 3620364, at *10 n.6.

4. Damages Calculations: Ordaz

Ordaz is entitled to unpaid overtime, unpaid spread-of-hours payments, liquidated damages, damages for wage statement violations, and prejudgment interest. I will address each of these in turn.

As an initial matter, "[w]hen an employer fails to maintain accurate wage and hour records, or when no such records have been produced as a consequence of the defendants' default, the plaintiff's recollection and estimates of hours worked are presumed to be correct." *Lopez*, 2015 WL 1469619, at *9 (internal quotation marks and citations omitted). Though I will presume that each plaintiff's recollections of his hours and compensation are true, a plaintiff must still prove damages to a "reasonable certainty." *Credit Lyonnais*, 183 F.3d at 155. In my computations, I relied on the declaration of Ordaz for the relevant dates to determine his schedule. While Plaintiffs interpreted, for example, "on or about January 2011" to mean through the first two weeks in January 2011, and "on or about August 2014" to mean through the first two weeks in August 2014 (*see* Ordaz Decl. ¶¶ 9-11; *see also* Dkt. No. 20-7 (Computation of Damages)), I have erred on the conservative side and applied the relevant schedule through the previous month (*i.e.*, through December 2010 and through July 2014, respectively).

First, as the chart below demonstrates, Ordaz is entitled to $29,975.00 in unpaid overtime. A plaintiff may recover damages for unpaid wages under either federal or state law, but not both. *See Lopez*, 2015 WL 1469619, at *9. In this case, both the FLSA and the NYLL require that an employee receive at least one-and-one-half times the regular rate as his overtime wage, so there is no difference between the statutes (other than their respective limitations period). *Galicia*, 2015 WL 1469279, at *5. Throughout the limitations period, Ordaz was paid $10 per hour, regardless of the number of hours he worked. Accordingly, Ordaz was owed $5 as an overtime premium per hour of overtime worked. As a result, I respectfully recommend that Ordaz be awarded $29,975.00 in unpaid overtime.

Period	Number of Weeks Worked in Period	Hours Worked Per Week	Overtime Hours Worked Per Week	Hourly Rate of Pay	Overtime Rate Owed	Overtime Premium (Overtime Rate Owed - Hourly Rate of Pay)	Weekly Overtime Owed (Overtime Premium x Overtime Hours Per Week)	Total Overtime Pay Owed (Weekly Overtime Owed x Number of Weeks)
1/13/2010 to 12/31/2010	50	60	20	$10.00	$15.00	$5.00	$100.00	$5,000.00
1/1/2011 to 4/8/2011	14	60	20	$10.00	$15.00	$5.00	$100.00	$1,400.00
4/9/2011 to 12/31/2011	38	60	20	$10.00	$15.00	$5.00	$100.00	$3,800.00
1/1/2012 to 12/31/2012	52	60	20	$10.00	$15.00	$5.00	$100.00	$5,200.00
1/1/2013 to 12/30/2013	52	60	20	$10.00	$15.00	$5.00	$100.00	$5,200.00
12/31/2013 to 7/31/2014	30	60	20	$10.00	$15.00	$5.00	$100.00	$3,000.00
8/1/2014 to 12/30/2014	22	57	17	$10.00	$15.00	$5.00	$85.00	$1,870.00
12/31/2014 to 12/30/2015	52	57	17	$10.00	$15.00	$5.00	$85.00	$4,420.00
12/31/2015 to 1/8/2016	1	57	17	$10.00	$15.00	$5.00	$85.00	$85.00
TOTAL								$29,975.00

Second, as the chart below demonstrates, Ordaz is entitled to $6033.00 in unpaid spread-of-hours payments under the NYLL. As discussed above, spread-of-hours pay may not be awarded to employees earning more than the minimum wage for any period before January 1, 2011, though it is available to such employees beginning in 2011. *See Xochimitl*, 2016 WL 4704917, at *7-9. Therefore, Ordaz may not be awarded spread-of-hours pay for the period from January 13, 2010 through December 31, 2010. As a result, I respectfully recommend that Ordaz be awarded $6033.00 in unpaid spread-of-hours payments.

Period	Number of Weeks Worked in Period	Days Per Week Ordaz Worked > 10 Hours	Days Per Period Ordaz Worked > 10 Hours (Days Per Week x Number of Weeks)	Hourly Rate of Pay	Applicable Minimum Wage	Total Spread-of-Hours Pay Owed (Days Per Period x Applicable Minimum Wage)
1/13/2010 to 12/31/2010	50	4	200	$10.00	$7.25	N/A
1/1/2011 to 4/8/2011	14	3	42	$10.00	$7.25	$304.50
4/9/2011 to 12/31/2011	38	3	114	$10.00	$7.25	$826.50
1/1/2012 to 12/31/2012	52	3	156	$10.00	$7.25	$1,131.00
1/1/2013 to 12/30/2013	52	3	156	$10.00	$7.25	$1,131.00
12/31/2013 to 7/31/2014	30	3	90	$10.00	$8.00	$720.00
8/1/2014 to 12/30/2014	22	3	66	$10.00	$8.00	$528.00
12/31/2014 to 12/30/2015	52	3	156	$10.00	$8.75	$1,365.00
12/31/2015 to 1/8/2016	1	3	3	$10.00	$9.00	$27.00
TOTAL						$6,033.00

Third, as the chart below demonstrates, Ordaz is entitled to $30,979.63 in liquidated damages under the NYLL. As discussed above, I decline to award "stacked" liquidated damages, and instead recommend that Ordaz be awarded the greater amount of liquidated damages under the NYLL. *Chowdhury*, -- F. App'x --, 2016 WL 7131854, at *2. The NYLL permitted an award of only 25% of liquidated damages until April 8, 2011, with 100% of the unpaid wages being awarded in liquidated damages thereafter. *See Fermin*, 93 F. Supp. 3d at 47. Accordingly, I respectfully recommend that Ordaz be awarded $30,979.63 in liquidated damages.

Period	**Total Overtime Pay Owed**	**Total Spread-of-Hours Pay Owed**	**Combined Wages Owed**	**NYLL Liquidated Damages %**	**Liquidated Damages (Combined Wages Owed x Liquidated Damages %)**
1/13/2010 to 12/31/2010	$5,000.00	N/A	$5,000.00	25%	$1,250.00
1/1/2011 to 4/8/2011	$1,400.00	$304.50	$1,704.50	25%	$426.13
4/9/2011 to 12/31/2011	$3,800.00	$826.50	$4,626.50	100%	$4,626.50
1/1/2012 to 12/31/2012	$5,200.00	$1,131.00	$6,331.00	100%	$6,331.00
1/1/2013 to 12/30/2013	$5,200.00	$1,131.00	$6,331.00	100%	$6,331.00
12/31/2013 to 7/31/2014	$3,000.00	$720.00	$3,720.00	100%	$3,720.00
8/1/2014 to 12/30/2014	$1,870.00	$528.00	$2,398.00	100%	$2,398.00
12/31/2014 to 12/30/2015	$4,420.00	$1,365.00	$5,785.00	100%	$5,785.00
12/31/2015 to 1/8/2016	$85.00	$27.00	$112.00	100%	$112.00
TOTAL					$30,979.63

Fourth, as discussed above, I respectfully recommend that Ordaz be awarded $5000.00 in damages for wage statement violations under NYLL § 195(3). Ordaz is not entitled to any damages for written notice violations under the applicable versions of NYLL § 195(1).

Finally, Ordaz is entitled to prejudgment interest. As indicated above, I will calculate the 9% per annum simple interest from January 11, 2013. The total of the NYLL damages owed to Ordaz is $41,008.00. This means that Ordaz is entitled to prejudgment interest in the amount of $3690.72 per year, or approximately $10.112 per day. As of the date of this report and recommendation, 1519 days have passed since January 11, 2013. Therefore, I respectfully recommend that Ordaz be awarded $15,359.46 in prejudgment interest.

Accordingly, I respectfully recommend that Ordaz be awarded $87,347.09 in damages, comprising: $29,975.00 in unpaid overtime; $6033.00 in unpaid spread-of-hours payments;

$30,979.63 in liquidated damages under the NYLL; $5000.00 for Defendants' failure to provide wage statements; and $15,359.46 in prejudgment interest.

5. Damages Calculations: Rodriguez

Rodriguez is entitled to his unpaid minimum wages, unpaid overtime, misappropriated tips, liquidated damages, damages for wage statement violations, and prejudgment interest. I will address each of these in turn.

First, as to unpaid minimum wages, "[w]here a plaintiff is entitled to damages under both federal and state law, the federal minimum wage does not preempt the state minimum wage and a plaintiff may recover under whichever statute provides the highest measure of damages." *Zurita v. High Definition Fitness Ctr., Inc.*, 2016 WL 3619527, at *5 (E.D.N.Y. June 9, 2016), *adopted by*, 2016 WL 3636020 (E.D.N.Y. June 29, 2016). Here, as demonstrated in the chart below, I have applied the higher statutory minimum wage that is applicable during each period of time. Rodriguez was paid at $6.00 per hour throughout his employment for Defendants, so he is entitled to recoup the differential between that hourly wage and the applicable minimum wage for the first 40 hours per week that he worked.

Period	Number of Weeks Worked in Period	Hours Worked Per Week	Hourly Rate of Pay	Applicable Minimum Wage	Differential (Minimum Wage - Hourly Rate)	Weekly Unpaid Minimum Wages (Differential x 40 hours)	Total Minimum Wages Owed (Weekly Unpaid Minimum Wages x Weeks in Period)
1/13/2010 to 12/31/2010	50	54	$6.00	$7.25	$1.25	$50.00	$2,500.00
1/1/2011 to 4/8/2011	14	48	$6.00	$7.25	$1.25	$50.00	$700.00
4/9/2011 to 12/31/2011	38	48	$6.00	$7.25	$1.25	$50.00	$1,900.00
1/1/2012 to 12/31/2012	52	48	$6.00	$7.25	$1.25	$50.00	$2,600.00
1/1/2013 to 12/30/2013	52	48	$6.00	$7.25	$1.25	$50.00	$2,600.00
12/31/2013 to 7/31/2014	30	48	$6.00	$8.00	$2.00	$80.00	$2,400.00
8/1/2014 to 12/30/2014	22	49	$6.00	$8.00	$2.00	$80.00	$1,760.00
12/31/2014 to 12/30/2015	52	49	$6.00	$8.75	$2.75	$110.00	$5,720.00
12/31/2015 to 1/8/2016	1	49	$6.00	$9.00	$3.00	$120.00	$120.00
TOTAL							$20,300.00

Second, as the chart below demonstrates, Rodriguez is entitled to $15,526.50 in unpaid overtime. As discussed above, an employee is entitled to receive overtime pay at a rate of at least one-and-one-half times his normal rate under either federal or state law, but not both. *See Lopez*, 2015 WL 1469619, at *9; *Galicia*, 2015 WL 1469279, at *5. Here, Rodriguez was paid $6.00 for each hour he worked, including when he worked more than 40 hours in a week, which is below the minimum wage. Therefore, I calculate the applicable overtime premium based on the statutory minimum wage applicable during the relevant time periods: Rodriguez's overtime premium ranges from $4.88 to $7.50 per hour more than the $6.00 hourly wage that Rodriguez was paid even during all hours that he worked, including overtime. Accordingly, I respectfully recommend that the Court award Rodriguez $15,526.50 in unpaid overtime.

Period	Number of Weeks Worked in Period	Hours Worked Per Week	Overtime Hours Worked Per Week	Hourly Rate of Pay	Applicable Minimum Wage	Overtime Rate Owed	Overtime Premium Owed (Overtime Rate Owed - Hourly Rate)	Weekly Overtime Owed (Overtime Premium x Overtime Hours Per Week)	Total Overtime Pay Owed (Weekly Overtime x Number of Weeks)
1/13/2010 to 12/31/2010	50	54	14	$6.00	$7.25	$10.88	$4.88	$68.25	$3,412.50
1/1/2011 to 4/8/2011	14	48	8	$6.00	$7.25	$10.88	$4.88	$39.00	$546.00
4/9/2011 to 12/31/2011	38	48	8	$6.00	$7.25	$10.88	$4.88	$39.00	$1,482.00
1/1/2012 to 12/31/2012	52	48	8	$6.00	$7.25	$10.88	$4.88	$39.00	$2,028.00
1/1/2013 to 12/30/2013	52	48	8	$6.00	$7.25	$10.88	$4.88	$39.00	$2,028.00
12/31/2013 to 7/31/2014	30	48	8	$6.00	$8.00	$12.00	$6.00	$48.00	$1,440.00
8/1/2014 to 12/30/2014	22	49	9	$6.00	$8.00	$12.00	$6.00	$54.00	$1,188.00
12/31/2014 to 12/30/2015	52	49	9	$6.00	$8.75	$13.13	$7.13	$64.13	$3,334.50
12/31/2015 to 1/8/2016	1	49	9	$6.00	$9.00	$13.50	$7.50	$67.50	$67.50
TOTAL									$15,526.50

Third, Rodriguez is entitled to damages in the amount of $1083.75 to account for tips that were misappropriated by Defendants. Based on the uncontroverted allegations and evidence presented, I conclude that Rodriguez has demonstrated his entitlement to reimbursement to a "reasonable certainty." *Credit Lyonnais*, 183 F.3d at 155. As depicted in the chart below, Rodriguez should be reimbursed for the $15.00 per month in tips that he earned and that were withheld by Defendants. *See Mahoney*, 2016 WL 6585810, at *13; *Gunawan*, 897 F. Supp. 2d at 90. Accordingly, I respectfully recommend that the Court award Rodriguez damages in the amount of $1083.75 in tips earned by Rodriguez that were withheld by Defendants.

Period	**# of Months in Period**	**Tips Withheld Per Month**	**Total Tips Withheld in Period**
1/13/2010 to 12/31/2010	12	$15.00	$180.00
1/1/2011 to 4/8/2011	3.25	$15.00	$48.75
4/9/2011 to 12/31/2011	8.75	$15.00	$131.25
1/1/2012 to 12/31/2012	12	$15.00	$180.00
1/1/2013 to 12/30/2013	12	$15.00	$180.00
12/31/2013 to 7/31/2014	7	$15.00	$105.00
8/1/2014 to 12/30/2014	5	$15.00	$75.00
12/31/2014 to 12/30/2015	12	$15.00	$180.00
12/31/2015 to 1/8/2016	0.25	$15.00	$3.75
TOTAL			$1,083.75

Fourth, as the chart below demonstrates, Rodriguez is entitled to $31,369.81 in liquidated damages under the NYLL. As discussed above, I decline to award "stacked" liquidated damages, and instead recommend that Ordaz be awarded the greater amount of liquidated damages under the NYLL (*Chowdhury*, -- F. App'x --, 2016 WL 7131854, at *2)—*i.e.*, only 25% of liquidated damages until April 8, 2011, with 100% of the unpaid overtime and spread-of-hours pay being awarded in liquidated damages thereafter. *See Fermin*, 93 F. Supp. 3d at 47. Accordingly, I respectfully recommend that Rodriguez be awarded $31,369.81 in liquidated damages.

Period	**Total Minimum Wages Owed**	**Total Overtime Pay Owed**	**Total Tips Withheld**	**Combined Wages Owed**	**NYLL Liquidated Damages %**	**Liquidated Damages (Combined Wages Owed x Liquidated Damages %)**
1/13/2010 to 12/31/2010	$2,500.00	$3,412.50	$180.00	$6,092.50	25%	$1,523.13
1/1/2011 to 4/8/2011	$700.00	$546.00	$48.75	$1,294.75	25%	$323.69
4/9/2011 to 12/31/2011	$1,900.00	$1,482.00	$131.25	$3,513.25	100%	$3,513.25
1/1/2012 to 12/31/2012	$2,600.00	$2,028.00	$180.00	$4,808.00	100%	$4,808.00
1/1/2013 to 12/30/2013	$2,600.00	$2,028.00	$180.00	$4,808.00	100%	$4,808.00
12/31/2013 to 7/31/2014	$2,400.00	$1,440.00	$105.00	$3,945.00	100%	$3,945.00
8/1/2014 to 12/30/2014	$1,760.00	$1,188.00	$75.00	$3,023.00	100%	$3,023.00
12/31/2014 to 12/30/2015	$5,720.00	$3,334.50	$180.00	$9,234.50	100%	$9,234.50
12/31/2015 to 1/8/2016	$120.00	$67.50	$3.75	$191.25	100%	$191.25
TOTAL						$31,369.81

Fifth, like Ordaz, I respectfully recommend that Rodriguez be awarded $5000.00 in damages for wage statement violations in accordance with NYLL §§ 195(3) and 198. Rodriguez may not be awarded damages for failure to provide written notice in violation of NYLL § 195(1).

Finally, Rodriguez is entitled to prejudgment interest. As indicated above, I will calculate the 9% per annum simple interest from January 11, 2013. The total of the NYLL damages owed to Rodriguez is $41,910.25. This means that Rodriguez is entitled to prejudgment interest in the amount of $3771.92 per year, or approximately $10.334 per day. As of the date of this report and recommendation, 1519 days have passed since January 11, 2013. Therefore, I respectfully recommend that Ordaz be awarded $15,697.40 in prejudgment interest.

Accordingly, I respectfully recommend that Rodriguez be awarded $88,977.46 in damages, comprising: $20,300.00 in unpaid minimum wages; $15,526.50 in unpaid overtime; $1083.75 in tips withheld by Defendants; $31,369.81 in liquidated damages under the NYLL; $5000.00 for Defendants' failure to provide wage statements; and $15,697.40 in prejudgment interest.

C. Attorney's Fees, Costs, and Disbursements

1. Attorney's Fees

Plaintiffs seek an award of attorney's fees in the amount of $5600.00. *See* Dkt. No. 20-6 (Attorney Time Records). Both the FLSA and the NYLL authorize the Court to award Plaintiffs their reasonable attorney's fees. 29 U.S.C. § 216(b); NYLL § 198. The same analysis applies to determine the fee under both statutes. *See Mahoney*, 2016 WL 6585810, at *17 (citation omitted). "Courts in this circuit assess fee applications using the 'lodestar method,' under which a reasonable hourly rate is multiplied by a reasonable number of hours expended." *Gesualdi v. Mack Excavation & Trailer Serv., Inc.*, 2010 WL 985269, at *6 (E.D.N.Y. Feb. 12, 2010) (citations omitted), *adopted as modified by*, 2010 WL 985294 (E.D.N.Y. Mar. 15, 2010).

The reasonable hourly rate is "the rate a paying client would be willing to pay," based on the "prevailing [hourly rate] in the community . . . . where the district court sits." *Arbor Hill*

Concerned Citizens Neighborhood Ass'n v. City of Albany, 522 F.3d 182, 190 (2d Cir. 2007) (internal quotation marks and citation omitted); *see King v. STL Consulting, LLC*, 2006 WL 3335115, at *7 (E.D.N.Y. Aug. 29, 2006), *adopted by*, 2006 WL 3335115 (E.D.N.Y. Oct. 3, 2006). A party seeking attorney's fees bears the burden of supporting his claim of hours spent by furnishing accurate, detailed, and contemporaneous time records. *See New York State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1147-48 (2d Cir. 1983). A district court has broad discretion to assess the ultimate reasonableness of each component of a fee award. *Lopez*, 2015 WL 1469619, at *12 (citation omitted).

In this case, Plaintiffs seek reimbursement for two attorneys, Michael Faillace and Joshua Androphy, attorneys at the firm of Michael Faillace & Associates, P.C., at the hourly rate of $400 per hour. *See* Dkt. No. 20-6 (Attorney Time Records). Mr. Faillace is the managing member of the firm and has been in practice since 1983. Dkt. No. 20 (Declaration of Joshua Androphy), ¶ 17(h)(i). Mr. Faillace served as in-house employment counsel for International Business Machines Corporation from 1983 to 2000, taught employment discrimination at New York-area law schools, and speaks on employment law matters. *Id.* For his part, Mr. Androphy is a senior associate who has practiced in employment litigation since 2005. *Id.* ¶ 17(h)(ii).

Reasonable hourly rates for wage and hours cases in this District have generally been set at approximately $300 to $400 for partners and $200 to $300 for associates. *E.g.*, *Saucedo*, 2016 WL 8376837, at *18; *Ferrera v. Tire Shop Ctr.*, 2016 WL 7626576, at *5 (E.D.N.Y. Oct. 14, 2016), *adopted by*, 2017 WL 27946 (E.D.N.Y. Jan. 3, 2017). While Mr. Faillace is highly experienced, I find it appropriate to reduce his $400 hourly rate in this case given the relative simplicity of this case in light of Defendants' default. *See Cortez v. 8612 Best Coffee Shop Inc.*, 2015 WL 10709830, at *9 (E.D.N.Y Aug. 14, 2015), *adopted by*, 2016 WL 1559148 (E.D.N.Y.

Apr. 18, 2016). I am guided by recent decisions in this District, and respectfully recommend that Mr. Faillace's hourly rate be reduced to $350 per hour and Mr. Androphy's hourly rate be reduced to $250 per hour. *See id.*, 2015 WL 10709830, at *9 (recommending reduction of Mr. Faillace's hourly rate to $300 and Mr. Androphy's hourly rate to $225 in FLSA default judgment case where attorneys worked 32.9 hours); *accord Ferrera*, 2016 WL 7626576, at *5 (recommending experienced FLSA attorney receive $350 per hour); *Flores v. Mamma Lombardi's of Holbrook, Inc.*, 104 F. Supp. 3d 290, 312-14 (E.D.N.Y. 2015) (reducing lead partner's rate to $350 per hour and junior partner's rate to $200 per hour); *Fermin*, 93 F. Supp. 3d at 52 (recommending that attorney with over 16 years of experience be awarded $350 per hour); *Shiu v. New Peking Taste, Inc.*, 2013 WL 2351370, at *13 (E.D.N.Y. Mar. 14, 2013) ("The Court concludes that $275 an hour for a lawyer with more than ten years' experience is reasonable."), *adopted in relevant part by*, 2013 WL 2351370 (E.D.N.Y. May 28, 2013).

Mr. Faillace and Mr. Androphy spent a combined 14.0 hours working on this case. Dkt. No. 20-6 (Attorney Time Records). Having reviewed the contemporaneous billing records filed with the Court, the amount of time spent is eminently reasonable. *See Lopez*, 2015 WL 1469619, at *13 (recommending that a total of 42.1 hours be found reasonable in FLSA default judgment case). Accordingly, I respectfully recommend that Plaintiffs be awarded total attorney's fees of $4260.00, based on Mr. Faillace's 7.6 hours working on this matter at an hourly rate of $350.00 and Mr. Androphy's 6.4 hours working on this matter at an hourly rate of $250.00.

2. Costs and Disbursements

Plaintiffs also request $700.00 in costs and disbursements, comprising $400.00 for a filing fee and $300.00 for service of process. *See* Dkt. No. 20-6 (Attorney Time Records). Awarding costs is authorized by the FLSA and the NYLL. 29 U.S.C. § 216(b); NYLL § 198.

However, such costs should only be awarded when they are tied to "identifiable, out-of-pocket disbursements." *Jemine v. Dennis*, 901 F. Supp. 2d 365, 394 (E.D.N.Y. 2012). As court filing fees and service of process fees are routinely recoverable, I respectfully recommend that Plaintiffs be awarded $700.00 in costs and disbursements. *See Zurita*, 2016 WL 3619527, at *11; *Fermin*, 93 F. Supp. 3d at 52.

III. CONCLUSION

For the foregoing reasons, I respectfully recommend that the Court grant Plaintiffs' motion for default judgment against defendants Ditmars Square Inc. d/b/a Last Stop Cafe and Marinos Constantinides and hold the defendants jointly and severally liable for a judgment awarding Plaintiffs $181,284.55, consisting of: (i) $87,347.09 in damages and prejudgment interest owed to Ordaz; (ii) $88,977.46 in damages and prejudgment interest owed to Rodriguez; (iii) $4260.00 in attorney's fees; and (iv) $700.00 in costs and disbursements.

Plaintiffs' counsel is directed to serve copies of this Report and Recommendation upon Defendants at their respective last known address and to file proof of service with the Court within seven (7) days of the date of filing of this Report and Recommendation.

IV. OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b)(2) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report and Recommendation to file written objections. Failure to file timely objections shall constitute a waiver of those objections both in the District Court and on later appeal to the United States Court of Appeals. *See Marcella v. Capital Dist. Physicians' Health Plan, Inc.*, 293 F.3d 42, 46 (2d Cir. 2002); *Small v. Sec'y of Health & Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989); *see also Thomas v. Arn*, 474 U.S. 140 (1985).

SO ORDERED.

/s/
Steven L. Tiscione
United States Magistrate Judge
Eastern District of New York

Dated: Brooklyn, New York
March 10, 2017